

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
PAWEL CZERNICKI	:	DETERMINATION
	:	DTA NO. 819148
	:	
for Revision of a Determination or for Refund of Mortgage	:	
Recording Tax under Article 11 of the Tax Law with	:	
Reference to an Instrument Recorded on November 17,	:	
1999.	:	

Petitioner, Pawel Czernicki, 156 Nassau Avenue, Apartment 1-R, Brooklyn, New York 11222, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on November 17, 1999.

The Division of Taxation, by its representative, Barbara G. Billett, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion dated November 7, 2002 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing *pro se*, did not respond to the motion of the Division of Taxation. The Division of Taxation's motion was filed on November 7, 2002. In determining the due date for petitioner's response pursuant to 20 NYCRR 3000.5(b), it was assumed that the Division's motion was served on the day it was filed. Petitioner's response was due on December 7, 2002, which date began the 90-day period for the issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied as untimely petitioner's claim for refund of mortgage recording tax where such claim was filed more than two years from the date of payment of the tax.

FINDINGS OF FACT

1. On November 20, 1998, an Order and Judgment was filed in the Kings County Clerk's Office in an action between petitioner, Pawel Czernicki, as plaintiff, and Marek Lawniczak, as defendant, ordering the removal of the name of Marek Lawniczak from the deed of the property known as 155 Huron Street, Brooklyn, New York.

2. On October 28, 1999, a second Order was filed which restrained and enjoined petitioner from, among other actions, mortgaging the real property located at 155 Huron Street, Brooklyn, New York.

3. Unaware of this second Order, petitioner, on November 16, 1999, entered into a mortgage agreement with Gabriela Skowyra in which the 155 Huron property was used to secure a mortgage in the amount of \$300,000.00. On November 17, 1999, petitioner recorded the mortgage and paid the mortgage recording tax in the amount of \$6,042.00. After being notified of the second Order prohibiting him from mortgaging the 155 Huron property, petitioner, on December 28, 2000, satisfied, in full, the mortgage to Gabriela Skowyra.

4. Stephen L. Godfrey is employed as a Tax Technician III in the Mortgage Tax Unit of the Transfer and Transaction Tax Bureau ("TTTB") of the Division of Taxation, and as been so employed since 1988. In the course of his duties, he supervises the receipt and entry of Mortgage Recording Tax Claim for Refund forms.

5. Prior to mortgage recording tax claims for refund being delivered to the Mortgage Tax Unit by the TTTB mail unit, they are “in-date” stamped by the mail unit on the day of receipt. The TTTB mail unit then delivers the “in-date” stamped Mortgage Recording Tax Claim for Refund forms to the “in” basket on the desk of Mr. Godfrey.

6. Mr. Godfrey then enters the information from the refund claims into the mortgage tax refund data base in the computer records of the TTTB. He dates each entry of the claims for refund based upon the date stamped by the TTTB mail unit and assigns to each the next available sequential mortgage tax refund number.

7. Mr. Godfrey searched the mortgage tax refund data base for information related to the filing of any mortgage recording tax claims for refund pertaining to petitioner. In his search, Mr. Godfrey discovered that petitioner had filed a Mortgage Recording Tax Claim for Refund form which requested a refund of \$6,042.00. This claim for refund was signed by petitioner on June 10, 2002 and received by the TTTB on June 14, 2002. A copy of the claim for refund supports this conclusion. Mr. Godfrey’s search revealed that petitioner did not file any claim for refund of mortgage recording tax prior to June 14, 2002.

8. On June 25, 2002, the Mortgage Tax Unit of the Transfer and Transaction Tax Bureau sent to petitioner a denial letter of his refund claim. The letter provided, in relevant part, as follows:

Please be advised that Article 11, Section 263 of the Tax Law states in part, “No refund of tax paid under this article shall be allowed unless the application for refund is filed within two years from the time the erroneous payment of tax was received. . .” Regardless of the basis on which your refund claim has been submitted, it was not timely filed. For this reason, your request for a refund of the tax paid is hereby denied.

9. Petitioner claims that he filed by United States Postal Service ordinary mail a Mortgage Recording Tax Claim for Refund on September 5, 2001. In support of this allegation, petitioner

has submitted an affidavit of the individual claiming to have mailed the claim for refund accompanied by an unsigned Mortgage Recording Tax Claim for Refund. The claim for refund does bear the signature of a notary public and the date September 4, 2001.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as [summary judgment] motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also*, ***Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999.) Summary judgment is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (***Moskowitz v. Garlock***, 23 AD2d 943, 259 NYS2d 1003, 1004; *see*, ***Daliendo v. Johnson***, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgment must be used sparingly (***Wanger v. Zeh***, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (***Daliendo v. Johnson***, *supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93, 94; ***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881).

As noted, a party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). On the other hand, one opposing a motion for summary determination:

must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York, supra*).

Petitioner in this case did not respond to the motion of the Division for summary determination. Therefore, petitioner is deemed to have conceded that the facts as presented in the affidavit submitted by the Division are correct (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). However, in determining a motion for summary determination the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Village of Patchogue Fire Dept., supra* at 179; *see also, Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458, 461). Such evidence in this matter includes the petition and the attachments submitted with the petition (20 NYCRR 3000.9[b][1]). In this case, upon all of the proof presented and pursuant to the following discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

B. Article 11 of the Tax Law imposes taxes on the recording of a mortgage on real property situated in New York State. Pursuant to Tax Law § 263(1)(a), “[n]o refund of tax paid under this article [Article 11] shall be allowed unless the application for refund is filed within two years

from the time the erroneous payment of tax was received.” Here, petitioner paid recording tax on November 17, 1999. Petitioner’s refund claim was filed on June 14, 2002, well beyond the two-year limitations period. The Division therefore properly denied petitioner’s refund claim as untimely.

C. Since there is no evidence of actual receipt of petitioner’s claim for refund allegedly filed on September 5, 2001 and ordinary mail was used, petitioner’s affidavit is insufficient to establish that he filed a timely claim for refund within two years from the date of payment of the mortgage recording tax (*see, Matter of YSC Fashion Corporation*, Tax Appeals Tribunal, January 23, 1992; *Matter of Bove*, Tax Appeals Tribunal, February 22, 1991; *Matter of Messinger*, Tax Appeals Tribunal, March 16, 1989; *Matter of Sipam Corp.*, Tax Appeals Tribunal, March 10, 1988). By choosing to mail the claim for refund by ordinary mail rather than by certified or registered mail, petitioner bore the risk that the document might not be delivered at all and that there would be no supporting documentation to prove mailing (*see, Matter of Bove, supra; Matter of Sipam Corporation, supra*). The claim for refund filed on June 14, 2002 was the first claim for refund received by the Mortgage Tax Unit of the TTTB. The two-year period for filing a claim for refund expired on November 17, 2001. Therefore, petitioner’s claim for refund was untimely.

D. The petition of Pawel Czernicki is denied, and the Division of Taxation’s denial of petitioner’s claim for refund is sustained.

DATED: Troy, New York
February 13, 2003

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE